

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
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Date: **March 3, 1999**
Case No. **1997-INA-304**

In the Matter of:

CARLOS UY III,
Employer,

on behalf of

ISABEL C. LABAYEN,
Alien.

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Appearance: Dan E. Korenberg, Esquire
for Employer and Alien

Before: Burke, Guill, Holmes, Huddleston, Jarvis,
Lawson, Neusner, Wood and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook.¹

¹ Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as

The CO denied certification on the ground that Employer failed to establish that the job offer is clearly open to willing, able, qualified and available U.S. workers, and is a *bona fide* offer for full-time employment in violation of sections 656.3 and 656.20(c)(8). (AF 118-119). The Board has considered this matter *en banc* to clarify the application of those regulations to domestic cook cases.

STATEMENT OF THE CASE

Employer, Carlos Uy III, placed an advertisement for the employment of a domestic cook in the Los Angeles Times on April 25, 26 and 27, 1995. There were no responses to the advertisement and no referrals of applicants by the state employment service. (AF 166). When the CO reviewed the application, however, she proposed to deny certification in a Notice of Findings ("NOF") dated March 21, 1996, based on her findings that the job opportunity was not for full-time employment in violation of section 656.3; and that the job opportunity was not truly open to U.S. workers in violation of section 656.20(c)(8). (AF 152-156).² The CO wrote:

[T]his office notes that the Immigration Act of 1990 (IMMACT 1990) reduced the number of immigrant visas available to **unskilled** alien workers (aliens granted labor certifications in occupations requiring less than two years of experience). The visas waiting period for aliens in the unskilled visa category now exceeds five years. For all practical purposes, immigrant visas for unskilled workers are unavailable.

However, immigrant visas for **skilled** alien workers (aliens granted labor certification in occupations requiring at least two years of experience) are currently available without a significant waiting period.

(AF 153, emphasis in original). The CO then observed that the Dictionary of Occupational Titles ("DOT") permits a Domestic Cook to be defined as skilled labor because of the specific vocational preparation ("SVP")³ permitting one to two years of experience, whereas, the SVP for a houseworker is only 30 days to three months, and therefore is unskilled labor under IMMACT

contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(c).

² In the NOF the CO also challenged Employer's ability to pay the wage offered pursuant to sections 656.20(c)(1) and (c)(4); however, she did not raise ability to pay as a basis of denial in the Final Determination.

³ SVP is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. It includes vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. DICTIONARY OF OCCUPATIONAL TITLES at 1009.

1990.⁴ (AF 153). The CO observed that since IMMACT 1990 went into effect in 1991, her office has seen a significant decline in applications for unskilled domestic workers and a marked increase in applications for skilled domestic workers. (AF 153-154). The CO therefore drew the conclusion that employers are inflating the job duties and requirements in labor certification applications to qualify alien workers for immediate visas as skilled workers under the provisions of IMMACT 1990. (AF 154). The CO noted that the job was newly created, (AF 154) and that Employer did not appear to need a full-time employee to cook for the household. (AF 153). Thus, the CO held that "[t]he employer's rebuttal must establish conclusively that the job opportunity described on the ETA 750A does in fact exist and that the employer **has a job opportunity** for a **skilled** worker." (AF 154, emphasis in original).

The CO set forth certain areas regarding the job duties and requirements Employer needed to submit documentation about in order to establish that "the position as performed in the employer's household clearly constitutes full-time employment . . . [and] that the job has not been created for the alien." More specifically, the CO requested documentation regarding past performance of the duties; number of meals prepared weekly and the amount of time required to prepare each meal; entertainment schedule for the previous twelve month period; Alien's duties

⁴ The DOT provides two definitions for persons who cook in a domestic house:

301.474-010 HOUSE WORKER, GENERAL (domestic ser.) alternate titles: housekeeper, home

Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats, and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets.

GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86

305.281-010 COOK (domestic ser.)

Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic ser.).

GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81

and frequency of each duty; schedule of pre-school or school age children including who cares for them; work schedules of parents; who will perform the household work and who performed it in the past. It was clear that the CO sought more than assertions and conclusions — but also supporting "data". (AF 154-155).

In his rebuttal, Employer's counsel began with a two and one-half page statement, much of which criticized the NOF for being uninformative and in effect taking the position that since the CO failed to meet minimal informative requirements for an NOF, Employer would minimally respond by simply submitting assertions responding to specific matters presented by the CO's NOF. (AF 121).

Employer's attached statement consists of a five page letter (AF 128-133), with a partial copy of a 1994 IRS 104 (AF 134), and seven pages of photographs of a birthday party. (AF 135-141). He stated that in the past, he and his wife performed the cooking duties for their household of five – husband, wife, one school age child, one pre-school age child, and Employer's brother. The child who is not in school is cared for in the home by a relative, as is the school age child while that child is not in school and before the parents return from work. Employer provided the work and school schedules for each member of the household. He described the typical work day for the cook and stated that every Saturday night they have between five and ten additional guests (usually relatives) for dinner, and on Sunday there is always a family brunch after church for all the relatives. Employer also asserted that once a month he hosts a dinner meeting of the Tanauan Association of Los Angeles at his house, and that he intends to have the cook prepare a meal for these meetings. Employer listed specific dates of entertainment from May, 1994 until March, 1995. He asserted that he, his wife and his brother share the household cleaning chores.

On July 30, 1996, the CO issued a Final Determination denying labor certification, determining that the rebuttal failed to demonstrate that the job duties would constitute full-time employment, and that she was not convinced that the job was truly open to U.S. workers. (AF 118-119). The CO stated:

The rebuttal does not provide information sufficient to explain convincingly what the cook does during all of the work hours from 7:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m. on Wednesday, Thursday, and Friday, and from 11:00 a.m. to 8:00 p.m. on weekends.

While it may appear that there is a need for some meal preparation, the job duties to be performed by the cook do not appear to constitute full-time employment.

* * *

Thus, based on the sparse and incomplete information furnished in

the rebuttal, it is not convincingly documented that a domestic cook would be engaged in permanent full-time work. The employer remains in violation of 20 C.F.R. 656.20 (c) (8) which stipulates that the job must truly be open to U.S. workers.

(AF 119).

On August 21, 1996, Employer, through counsel, filed a motion for reconsideration by the CO. Employer also requested Board review. (AF 2-117). The CO denied reconsideration on September 26, 1996, on the ground that the motion concerned matters that could have been addressed in the rebuttal. (AF 1). The matter was transferred to this Board on May 1, 1997.

DISCUSSION

I. NOTICE OF FINDINGS. BONA FIDE JOB OPPORTUNITY ANALYSIS WHEN IT APPEARS THAT JOB WAS MISCLASSIFIED

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, 89-INA-228, *supra*. When an employer presents a labor certification application for a "Domestic Cook," attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee.⁵ The DOT contemplates that a domestic cook is a skilled, professional cook, and

⁵ Common experience is confirmed by the composite description of "Private Household Workers" contained in the Bureau of Labor Statistic's (BLS) OCCUPATIONAL OUTLOOK HANDBOOK (1998-99 ed.), of which we take official notice. BLS notes that "[m]ost household workers are *general houseworkers* and usually the only worker employed in the home." *Id.* at 335. It states that "[h]ouseholds with a large staff may include a household manager, housekeeper or butler, cook, caretaker, and launderer." *Id.* at 335. More specifically, BLS generated statistics to the effect that

Private household workers held about 802,000 jobs in 1996. About 63 percent were general houseworkers, mostly dayworkers; 34 percent were child-care workers, including baby sitters; and less than 3 percent were housekeepers, butlers, cooks, and launderers. Most jobs are in big cities and their affluent suburbs. Some are on large estates or in resorts away from cities.

Id. at 336. In the 1990-91 edition of the OCCUPATIONAL OUTLOOK HANDBOOK, private household workers were reported to hold about 902,000 jobs in 1988, with about 6 percent holding jobs as housekeepers, butlers, cooks, and launderers. Both the 1998-99 and 1990-91 editions noted that the employment of private household workers is expected to decline, although job opportunities remain good

would be able to cook sophisticated meals, as illustrated by the much higher experience requirement.⁶ Thus, such an application raises the question of whether the employer is really seeking a housekeeper, nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States.⁷ One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under IMMACT 1990.⁸ If a labor

because the demand far outpaces the supply of workers.

In discussion of training and career advancement opportunities, BLS reports that “[p]rivate household workers generally do not need any special training,” and that “There are very few opportunities for advancement within this occupation. Few large households exist with big staffs where general houseworkers can advance to cook, executive housekeeper, butler, or governess, and these jobs may require specialized training.” *Id.* at 336. Thus, the Occupational Outlook Handbook confirms what most persons would intuitively believe – that a household that retains an employee whose duties are only to cook is an atypical household.

⁶ See footnote 4, *supra*. Moreover, the DOT indicates that a domestic cook's duties are confined to the kitchen. If any general housework is done, the DOT would categorize the position as an unskilled houseworker. See *Glenn K. Garnes*, 1994-INA-17 (May 15, 1995)

⁷ See *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*); *Malone & Associates*, 1990-INA-350 (July 16, 1991) (*en banc*); see also *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992).

⁸ See, e.g., the following statement contained in Volume I, of the American Immigration Lawyers Association, 1995-96 Immigration & Nationality Law Handbook at 250:

The third preference comprises skilled workers (that is, workers who will occupy jobs requiring at least two years of training or experience), professionals holding a bachelor's degree, and “other workers” (that is unskilled workers who will occupy jobs requiring less than two years of training or experience). There will also be 40,040 visas available for this category per year plus any spill down from the previous categories. However, only 10,000 of these visas per year will be allowed for “other workers” and there is no spill down from the higher categories. At present it is projected that it may take longer than ten years for aliens processed through the “other workers” category to obtain permanent resident status. It is reasonable to expect, therefore, that attorneys will file applications for labor certification for jobs that require at least two years of experience or training whenever appropriate and possible.

See also, the following statement contained in Volume I of the American Immigration Lawyers Association, 1992-93 Immigration & Nationality Law Handbook at 206, discussing the impact of IMACT 1990 on unskilled third preference workers (“other workers”):

Other workers are those unlucky enough to be in positions which require less than two years of training or experience. Given that the current backlog for this category is four years, and the State Department predicts an advance of one week per month, prospects for immigration in this

certification application mischaracterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-skilled domestic positions that include cooking duties. Thus, we conclude that the CO acts properly in invoking section 656.20(c)(8) when he or she suspects mischaracterization of the job.

II. *NOTICE OF FINDINGS. WHEN CO INVOKES LACK OF A BONA FIDE JOB OPPORTUNITY AS A VIOLATION, IT IS ESPECIALLY IMPORTANT THAT THE NOF BE CLEAR, EXPLICIT AND INFORMATIVE*

In all cases, a NOF must be clear and provide adequate notice to an employer of the regulatory violations found.⁹ A finding of a violation of section 656.20(c)(8) is especially problematic insofar as it is a highly generalized citation of error. An employer faced with a section 656.20(c)(8) citation is in a difficult position unless the precise reasons for finding that a job is not clearly open to U.S. workers is stated in the NOF. Thus, when the CO invokes section 656.20(c)(8) as grounds for denial of an application, administrative due process mandates that the CO specify precisely why the application does not appear to state a *bona fide* job opportunity.

In this matter, the CO's NOF was, for the most part, specific and identified the nature of

category are dim. Unless Congress allocates more visa numbers, it will take far more than four years to obtain a visa in this category. If an employer has already obtained labor certification for an employee in a position which requires less than two years experience, it would be worthwhile to determine if a new labor certification could be filed on behalf of the alien for a position which requires two years of training or experience.

See also Dr. Daryao S. Khatri, 1994-INA-16 (Mar. 31, 1995); *Pradeep K. Gupta*, 1994-INA-395 (June 12, 1995); *Marguerite Gorman*, 1995-INA-672 (Aug. 25, 1997). The relevant statutory provision is found at 8 U.S.C.A. § 1153 (b)(3).

⁹ The Board addressed what constitutes adequate notice of a violation in *Miaofu Cao*, 94-INA-53 (Mar. 14, 1996) (*en banc*):

Twenty C.F.R. § 656.25 requires that the CO issue a Notice of Findings if certification is not granted. The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group*, 87-INA-674 (Mar. 16, 1988) (*en banc*). Although the NOF must put the employer on notice of why the CO is proposing to deny certification, it is not intended to be a decision and order that makes extensive legal findings and discusses all evidence submitted to the file. The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application. Case law has established that to provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation, *Flemah, Inc.*, 88-INA-62 (Feb. 21, 1989) (*en banc*); inform the employer of the evidence supporting the challenge, *Shaw's Crab House*, 87-INA-714 (Sept. 30, 1988) (*en banc*); and provide instructions for rebutting and curing the violation, *Peter Hsieh*, 88-INA-540 (Nov. 30, 1989).

the violation. In two respects, however, it was not so clear:

(1) When asking for documentation under the heading “Corrective Action,” the CO stated that “[t]he employer must establish that the job offer meets the definition of “employment” at 20 CFR 656.3, by providing **evidence** that establishes that the position as performed in the employer’s household clearly constitutes full-time employment. The employer must also establish that the job has not merely been created for the alien.” (AF 125) This phrasing suggests that the CO was requesting documentation primarily on the question of whether the job will occupy the worker full-time. As discussed below in Part V. A., the relevant question is more than just whether the work duties will occupy the worker full-time. In context, however, we believe that the NOF was raising both section 656.20(c)(8) and 656.3 violations.

(2) Under the same “Corrective Action” heading, the CO listed six categories of information on which the employer would be required to supply rebuttal documentation. This phrasing suggests that Employer only needed to supply documentation on the requested information to present a successful rebuttal, and obtain labor certification. If this is not what the CO intended, the message was not conveyed.

III. *REBUTTAL*. ULTIMATELY, IT IS EMPLOYER’S BURDEN OF PROVING THAT A LABOR CERTIFICATION SHOULD BE ISSUED

The NOF is not required, however, to be a detailed guide on how to achieve labor certification. *Miaofu Cao*, 94-INA-53 (Mar. 14, 1996) (*en banc*). Moreover, the burden of proving that the employer is offering a *bona fide* job opportunity, and specifically that he or she is offering full-time employment, is on the employer. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988) (*en banc*); 20 C.F.R. § 656.2(b). Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.

In this matter, Employer argued in his rebuttal’s cover letter that since the NOF did not require a specific type of documentation, an undocumented statement from the employer is sufficient evidence to satisfy the request, citing *Greg Kare*, 1989-INA-7 (Dec. 18, 1989), which is based in turn on an interpretation of *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). We reject such a reading of *Kare* and *Gencorp*. The decision in *Gencorp* provides that “written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve.” *Gencorp* does not suggest that where a CO does not request a specific type of document, an employer's undocumented assertion must be accepted and certification granted. To the contrary, the holdings of many BALCA panels state that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's

burden of proof. *See, e.g., A.V. Restaurant*, 1988-INA-330 (Nov. 22, 1988); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989). We concur with these holdings.

IV. **FINAL DETERMINATION. CO MUST CLEARLY STATE RATIONALE AND BASIS FOR CONCLUSION.**

Employer argues on appeal that he answered each of the specific requests for information stated in the NOF, and the Final Determination was deficient in that it merely dismissed the rebuttal with a boilerplate form. We agree that the Final Determination failed to reveal any rationale for the denial of certification other than simply not believing Employer's rebuttal. It does not explain why Employer's rebuttal was not believable.

An employer's presentation of a position description for labor certification that, in some instances, strains credulity, does not relieve the CO from an obligation to review the employer's rebuttal documentation and to state in the Final Determination what aspects of that documentation are deficient.¹⁰ Thus, a CO's finding that a job is not *bona fide* because it is not full-time or permanent must have some foundation. *Han Yang Sewing Machine Co.*, 1988-INA-207 (June 29, 1989); *see Russian Village Restaurant*, 1994-INA-384 (Dec. 17, 1996).

That said, it must be observed that if the CO's NOF provides an employer with adequate notice of the nature of the violation, the basis for the CO's challenge, and instructions for rebutting or curing the deficiencies, an employer's complaint about the brevity of the CO's Final Determination on appeal will not change the fact that it was Employer's burden on rebuttal to produce sufficient evidence to show entitlement to a labor certification. *See Top Sewing, Inc. and Columbia Sportswear*, 1995-INA-563 and 1996-INA-38 (Jan. 28, 1997) (*per curiam*). Thus, the Board would not rule out affirming a denial of labor certification even in the absence of a fully reasoned Final Determination if the NOF provided adequate notice, and the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded.¹¹

In the instant case the Board is unable to determine clearly based on the Final Determination what was and was not considered in the CO's decision not to grant certification. For instance, the CO raised the issue of sufficiency of funds in the NOF, but did not mention it in the Final Determination. On rebuttal, Employer presented a partial copy of a tax return that

¹⁰ Compare *Bartlik v. Tennessee Valley Auth.*, 88-ERA-15 (Sec'y Dec. 6, 1991) (nuclear whistleblower decision in which the Secretary of Labor held that if credibility determinations are critical, the agency must articulate them with sufficient clarity to determine whether the ultimate finding of liability is supported by the record); *Fradley v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Sec'y Oct. 23, 1995). (Secretary of Labor held that an agency factfinder must give a full explanation of why specific evidence was rejected, since a factfinder cannot reject evidence for no reason or for the wrong reason).

¹¹ See generally *Stephens v. Heckler*, 766 F.2d 284 (7th Cir. 1985) (public good is not necessarily served by an appellate body that demands perfection in the processing of a claim).

arguably shows sufficiency of funds in an absolute sense to pay the wages of a domestic cook, but which also begs the question whether someone in Employer's position -- making a good, but not extraordinarily large, salary -- would really be willing to devote approximately one third of that salary to paying for an employee to do nothing but cook? Since the CO raised the sufficiency of the funds issue separately under section 656.20(c)(1) and (c)(4), and made no reference to it in regard to the section 656.20(c)(8) analysis, we do not know on the appeal whether the CO considered Employer's financial position at all in assessing the *bona fide* nature of the position, or whether this was the basis or part of the reasoning for not believing Mr. Uy.

V. APPLICATION OF TOTALITY OF CIRCUMSTANCES TEST

Because of problems with the CO's NOF and Final Determination, we are remanding this case. To better illustrate what is anticipated by the Board in an analysis of a *bona fide* job opportunity case, however, we will discuss the evidence in the current record. This discussion is without prejudice to Mr. Uy -- indeed, it may assist him on remand in building a better case for certification.

When applying the totality of the circumstances test, it may be helpful to think first in terms of the factual circumstances surrounding the application, and second, what those circumstances have to say about the *bona fides* of the position.

A. FACTUAL CIRCUMSTANCES

When applying the totality of the circumstances test to domestic cook applications, factual subjects that may typically be examined to determine whether the job is clearly open to a U.S. worker may include, *but are not limited to*:¹²

— the percentage of the employer's disposable income that will be devoted to paying the cook's salary

— whether the employee will be engaged in cooking duties for a substantial portion of the day. A focus solely on whether the person occupying the position will be gainfully occupied for a substantial portion of the work day, however, may overstate its importance.¹³ Although a basic forty hour week is typical of many employment

¹² This is only a list of possibly relevant factors; additional factors may be relevant; some of the listed factors may not be relevant at all in certain cases.

¹³ See today's *en banc* decisions in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) (holding that, for purposes of the definition of full-time employment at §656.3, there is little relevance in whether a worker's duties would require constant work for the entire work day, provided that the work day is customary for a full-time employee in the industry or under an employer's special circumstances); *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*) (holding that CO may request documentation relating to

environments,¹⁴ the custom is different for many employers¹⁵

— whether the employee will be required to perform functions such as child care, general cleaning, or other non-cooking functions (and if not, how the employer accomplishes those functions)

— whether the employer employs other domestic workers

— whether the employer has retained domestic cooks in the past, and if not, what circumstances prompted the instant job offer

— the extent of the alien's training and experience as a cook, and whether such training or experience involved cooking in a domestic situation

— general indicia of the employer's credibility or lack thereof, such as the employer's level of compliance and good faith in the processing of the application (*e.g.*, whether the employer initially offered a wage far below the prevailing wage; whether the recruitment process indicates a good faith effort to find U.S. workers)

– general indicia of the position possibly being used to promote immigration (*e.g.*, whether the alien's work history shows any propensity of the alien to engage in domestic work? If the alien has cooking experience, is it of a nature that suggests specialized skill that an employer would be willing to engage the alien to do nothing but cook? An explanation of how the alien learned of the job offer. Whether the employer and the alien have a relationship by virtue of familial connection, friendship, or other circumstances indicating a

full-time nature of position if citation of error includes §656.20(c)(8), sufficiency of funds, or ability to offer full-time work).

¹⁴ See, *e.g.*, the basic 40-hour workweek for employees of the Federal Government. 8 U.S.C. § 6101; 5 C.F.R. § 550.103.

¹⁵ A forty-hour work week is not a fixed requirement. For instance, the May 16, 1994, U.S. Department of Labor, Employment and Training Administration Field Memorandum No. 48-94, *reprinted in* AILA Monthly Mailing 544 (July/Aug. 1994), states in regard to nonagricultural labor certification programs that: "The Department determines whether a job is full-time or part-time by looking at the prevailing hours of work in that occupation. Full-time work in most occupations ranges from 35 to 40 hours per week. Therefore, a job offer is full-time if the weekly hours of work are within that range. If the hours are less than 35, the employer must document that fewer hours are prevailing for full-time employment in the occupation and area of employment." Similarly, the Immigration and Naturalization Service recognizes that hours of employment may vary with occupation and with industry. See, *e.g.*, *Executive Office for Immigration Review*, TM182, OI 204.4 Third and sixth-preference petitions (June 28, 1991). But see *Leonard Green*, 1994-INA-213 (June 5, 1995) (panel concludes that 30 hours per week could not be considered full-time employment, even though CO may have accepted such as full-time).

special connection between the two)

— Any special circumstances of the household (*e.g.*, nutritional requirements – which would be most credible if supported by independent documentation such as a physician's statement supported by objective documentation)

Such details about the circumstances of the application are relevant, but the Board has observed that many domestic cook cases degrade into debate on how each minute of the day will be spent. In analyzing the circumstances, the trier of fact should focus on how the circumstances relate to credibility of the position description.

B. CREDIBILITY OF POSITION DESCRIPTION

The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity or the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.¹⁶

In the instant case, based solely on the record presented on appeal,¹⁷ Mr. Uy presented his own statements, a partial copy of a tax return, and some photographs of a birthday party. His statements addressed each of the specific questions asked by the CO, and, if credible, would establish a full-time work schedule for the cook position.¹⁸

¹⁶ See generally *Mr. and Mrs. Jeffrey Hines*, 1988-INA-510 (Apr. 9, 1990) (credibility depends on the surrounding facts and circumstances, the source of the knowledge of the speaker, the interest of the speaker, the good or bad intentions of the speaker, the manner of testimony by the speaker, and other indices of honesty or credibility).

¹⁷ In his motion for reconsideration/request for Board review, Employer argued that the CO has "instituted a blanket policy of denying alien labor certification for cooks irrespective of the quality of the documentation submitted to rebut an NOF." He attempted to document this statement with a recitation of other domestic cook applications that had been granted by the CO in the past. This evidence was not presented in the rebuttal documentation, was not accepted for review in the CO's denial of reconsideration, and therefore is not in the record for review by this Board. See *Construction and Investment Corp.*, 1988-INA-55 (Apr. 24, 1989) (*en banc*). Even if we could consider this documentation, however, we do not find that it establishes the existence of such a policy by the CO.

¹⁸ On appeal, Employer contends that the fact that the DOT lists a domestic cook position is evidence that such a position is *bona fide*. The panel in *Dawn D. Holubiak*, 1995-INA-365 (June 5, 1997), considered this same argument, and concluded that the fact that the DOT lists a domestic cook position

Arrayed against the credibility of the position description are a great number of factors. First, as the CO noted, there is a strong motive for employers to describe a skilled position when applying for labor certification in order to avoid a long wait for a visa.

Second, obvious reasons exist for questioning the veracity and accuracy of the information supplied by Mr. Uy. For instance, he does not allege that he has used the services of a domestic worker whose only duties are cooking related. Thus, he is not in a position to really know whether the position he has described is a full-time job.¹⁹ Also relevant is the statistical reality that less than 3% of all domestic service jobs are for cooks – and those are usually in large households with staffs. There are always exceptions, but this statistic undoubtedly suggests that it is not common for a middle class family to employ a cook as opposed to a housekeeper.²⁰

Third, is the self-serving nature of Mr. Uy's statements, and their sometimes inherent implausibility.²¹ For instance, Mr. Uy may have the ability to pay the cook's wages in an absolute sense; but it is highly questionable on the record before us that he would be willing to use approximately one-third of his gross income to pay for a cook. It is possible that Mr. Uy has sources of money that would not have been identified in his tax return, but there is no evidence of that on the record. It seems remarkable that the first priority of the Uy household is to hire a cook, yet retain the duties of grocery shopping, cleaning, laundry, etc., for household members. Mr. Uy allegedly is generous and enjoys company so much that he has an open door policy for family members to visit and eat on weekends, and really would like to entertain the Tanauan Association with a full meal once a month. This, however, begs the question who is paying for all that food. Another example of the credibility problem is the seeming inconsistency between Mr. Uy's assertion that following lunch, the cook will prepare breads, pastries or pies for the evening meal, and his assertion in the following paragraph that the cook will be preparing a "low sodium,

description is not *prima facie* evidence that a position is a *bona fide* job opportunity. We concur with the panel's conclusion, and observe that a DOT listing is relevant to whether a position is *bona fide* insofar as it indicates that a job is a recognized type of work, but falls far short of being conclusive of whether the employer is making a *bona fide* offer of such employment.

¹⁹ See, e.g., *Paul David Nassau*, 1995-INA-523 (May 23, 1997). In *Bakst International*, 1989-INA-265 (Mar. 14, 1991), the panel held that where an employer's business involves a technically complex field, the labor certification process could be open to abuse by an employer who obscures actual job requirements in jargon and technical language. Similarly, where the employer's business involves an unknown, supported only by the employer's own guesswork, the labor certification process could be open to abuse by an employer who exaggerates job duties either out of ignorance or the motive to make something fit.

²⁰ See footnote 5, *supra*.

²¹ See, e.g., *Vallesteros v. I.N.S.*, 103 F.3d 143 (9th Cir. 1996) (unpublished) (court affirming Board of Immigration Appeals finding of inherent implausibility of alien's story); *Hardaway v. Chater*, 1996 WL 1031899 * 8 (C.D.Cal. 1996) (ALJ can consider inherent implausibility of testimony).

low cholesterol meal.”

Fourth, the record is wholly absent of verification for Mr. Uy’s assertions.²² Rather than supply supporting documentation, Mr. Uy choose instead to rely on an interpretation of *Kare*, *supra*, to the effect that if the CO does not specifically ask for a document, then the CO must accept what the Employer provides and grant certification. As noted above in Part III, we reject this interpretation of *Kare*. Moreover, we find that the CO also clearly asked in the NOF for supporting documentation. Mr. Uy’s rebuttal contained no information on the practice of full-time employment in domestic cook situations generally, such as affidavits from other households employing a cook, but rather just made up a schedule. Nor did he attempt to provide affidavits from family members and Tanauan Association members attesting to the Uy family’s practice of entertainment or appreciation of good cooking. A CO would be justified in drawing an adverse inference from such a lack of willingness to produce supporting documentation that would not support the employer’s case.²³

Finally, we note some other remarkable aspects of this application. At the time of the labor certification application, the Alien was in the United States on a B-2 visitor’s visa. (AF 192). No information is contained in the record indicating the issuance or expiration date of the visa. When asked by the state employment service to supply information about prior employment for the past three years, including employer names and addresses, she supplied information indicating that she had been employed by General Rent A Car from May 1989 to January 1993, by Dollar Rent A Car from January 1993 to June 1993, and Star Services Personnel from July 1993 to February 1994. However, she did not provide any addresses or indicate what country in which such employment occurred. (AF 194-195). Given that Employer lives in Glendale and the Alien lives in Long Beach, cities within the greater Los Angeles area a significant distance from each other, and that the greater Los Angeles area has a population of over eight million persons, the question arises as to how the Alien learned of this job. More specifically, the question becomes whether a familial or other special relationship exists between Employer and the Alien.²⁴ In

²² Possibly, the presentation of a contract of employment clearly specifying the limitation of the incumbent’s duties to cooking might assist an employer’s credibility by showing the seriousness of the desire for a cook and not a housekeeper. *Compare* § 656.21(a)(3)(ii)(E) & (H) (contract of employment for live-in domestic).

²³ As to an agency’s authority to draw adverse inferences, see *International Union, United Auto., Aerospace and Agr. Implement Workers of America v. N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972); *Dazzio v. F.D.I.C.*, 970 F.2d 71, 78 (5th Cir. 1992); *Crosier v. Westinghouse Hanford Co.*, 92-CAA-3 (Sec’y Jan. 12, 1994) (Secretary of Labor holding in environmental whistleblower case that if the complainant possessed copies of the documents that established his protected activities, he should have offered them into evidence).

²⁴ See, e.g., *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*) (ownership interest of alien in sponsoring employer); *Paris Bakery*, 1988-INA-337 (Jan. 4, 1990) (*en banc*) (family relationship).

addition, unusual hours of work are listed (7 AM to 10 AM and 4 PM to 9 PM, Wednesday through Friday, and from 11 AM to 8 PM on Saturdays and Sundays). Alien alleges that she meets the skilled experience requirement for the job offer because she completed the Cordon Bleu School's eleven month course of study in International Cuisine. She alleges that she completed this study in May 1983, worked as a chief cook in a Philippine restaurant until February of 1987. Neither the Alien nor Employer offered an address or information about the school or the restaurant wherein she worked, just as she did not provide addresses for the rental car agencies and the personnel service. She apparently has not worked in food preparation since 1987.

The state employment service provided Employer with an "Assessment Notice" in the early processing of the application. (AF 180-182). As a result, Employer changed the rate of pay from \$9.00 an hour to the prevailing wage rate of \$12.80. As a result of the state employment service question as to whether the job duty of purchasing food stuff and supplies would require driving and who would provide the vehicle and insurance, Employer changed the job duties to eliminate responsibility for purchasing food. Employer explained that "the worker will not be required to do the purchasing, but will place the order for food stuffs and supplies with her employer who would do the actual purchasing. Therefore no driving will be required." The state employment service also asked for a detailed explanation of the split shift requirement. Employer then amended the hours of work from -- 8 AM to 12 AM and 4 PM to 8 PM, Monday and Tuesday off -- to -- 7 AM to 10 AM and 4 PM to 9 PM, Wednesday through Friday, and from 11 AM to 8 PM on Saturdays and Sundays.²⁵ These amendments adjusted the time frame to make the worker on-site prior to departure of most of the household in the morning. (AF 161).

We recognize that Mr. Uy made many of his statements under penalty of perjury,²⁶ or at least in the presence of a notary. But simply making the statements under penalty of perjury does not compel the CO or this Board to accept the statements as credible.²⁷

²⁵ The record is unclear as to when the Saturday-Sunday work schedule was added, as it appears that the work hours were amended twice.

²⁶ When an employer files an *Application for Alien Employment Certification* form, he or she is required to swear or affirm, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the job opportunity is clearly open to any qualified U.S. workers. 20 C.F.R. § 656.20(c)(9). Making false statements to the United States Department of Labor in an application for permanent alien labor certification is a criminal offense pursuant to 18 U.S.C. § 1001-1002. See, e.g., *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989); *United States v. DeLoach*, 654 F.2d 763 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); *United States v. Singh*, 628 F.2d 758 (2d Cir. 1980), *cert. denied*, 449 U.S. 1034 (1980). See also 20 C.F.R. § 656.31; TAG No. 656 p 107-108 (Sept. 1981).

²⁷ *Marguerite Gorman*, 1995-INA-672 (Aug. 25, 1997) (CO is not required to accept undocumented statements of an employer that are inconsistent, illogical, or otherwise not capable of belief). We reject the contention that a CO cannot question the credibility of an employer's statement under oath unless he or she also reports possible fraud or willful misrepresentation to the Immigration and Naturalization Service and Department of Labor's Office of the Inspector General pursuant to 20 C.F.R. §

VII. CONCLUSION

In view of the lack of clarity of the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a *bona fide* job opportunity for a Domestic Cook. The CO shall then consider the existing record and any supplemental documentation submitted by Employer, and issue a Final Determination. If the CO determines

656.31 for possible criminal prosecution. As the court in *Rodriguez-Gutierrez v. I.N.S.*, 59 F.3d 504, 507-508 (5th Cir. 1995), held:

A finding that testimony lacked credibility does not alone justify the conclusion that false testimony has been given. False testimony means knowingly giving false information with an intent to deceive. A lack of credibility does not necessarily stem from a conclusion that the speaker intends to deceive. As a California district court stated, to assume that "a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character ... is not only legally invalid, but is contrary to the basic sense of fairness upon which our legal system is founded." *Acosta v. Landon*, 125 F.Supp. 434, 441 (S.D.Cal.1954).

Accord: *Vallesteros v. I.N.S.*, 103 F.3d 143 (9th Cir. 1996) (unpublished). In *Yedico International, Inc.*, 1987-INA-470 (Sept. 30, 1988) (*en banc*), the Board held that it does not operate under a preconception that employers routinely engage in fraud or other willful misconduct in attempting to obtain labor certification. We held that a CO who finds that evidence submitted by an employer is not genuine, must expressly state that finding and adequately support it with probative evidence. Absent such evidence, it is irresponsible to allege, whether directly or by implication, that an employer is engaged in fraudulent conduct in attempting to obtain certification. The logic of *Yedico* is sound, but we wish to emphasize that there is a qualitative difference between alleging fraud and finding that an employer's position is not credible.

that labor certification should be denied, she must explain her rationale for that determination.

ORDER

IT IS ORDERED that this matter is hereby **REMANDED** to the Certifying Officer.

JOHN M. VITTON
Chief Administrative Law Judge

Richard E. Huddleston, Administrative Law Judge, concurring:

I concur in the result reached by the majority, *i.e.*, that the NOF is unclear, that the Final Determination is inadequate, and that the case must be remanded for issuance of a new NOF. The CO's findings in this case are so inadequate that they amount to a denial of due process. However, I write separately to respectfully disagree with the majority in its approach to what should be examined on remand.

In denying certification, the CO has focused almost exclusively on whether the job duties will consume 35 to 40 hours per week¹. The CO's theory is that the employer does not truly have enough work to need a cook; therefore the job is not full-time (per § 656.3) and must be a sham to get the alien a visa; and therefore, the job is not clearly open to any qualified U.S. worker (violating § 656.20(c)(8)).

In my judgement this analysis is flawed. It is none of the CO's business whether a household **needs** a full-time cook, or whether the cook will be busy all day, or whether the cook will be paid to sit and wait until someone gets hungry. That is a personal lifestyle decision which an Employer is free to make in this country, and it has no relevance to this inquiry. The relevant inquiry is whether an Employer is **offering** full-time employment, not whether he **needs** a full-time employee. In the present case, the Employer is **offering** 40 hours of basic work plus overtime as needed. (AF 158). Therefore, this Employer is **offering** full-time employment. That should be the end of the inquiry on the issue of whether the job offered is full-time employment.

Whether the job offered is full-time and permanent also has nothing to do with whether a job is clearly open to any qualified U.S. worker as required by § 656.20(c)(8). If the job is not full-time and permanent, permanent labor certification cannot be granted. If it is full-time and

¹ This is also true of most of the household cook cases currently pending before BALCA.

permanent, it must **also** be clearly open to any qualified U.S. worker in order for permanent labor certification to be granted.

The majority has taken its “totality of circumstances” approach from *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*) and *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992). Those cases involve factual situations where the alien is an investor or principal in the company. In *Modular Container* we held that where an alien is an investor in the company, the job does not constitute genuine “employment” under § 656.50 (now recodified as § 656.3), *see* 56 Fed. 54930 (1991), and labor certification is barred *per se*. Thus, we held that where there is no *bona fide* job opportunity, there is no job which is clearly open to any qualified U.S. worker, in violation of § 656(c)(8); and that a totality of circumstances analysis would be applied to determine whether the job is bona fide. I fully agree with the analysis with respect to the alien investor and principal cases, and agree that any job opportunity must be bona fide in order to be in compliance with § 656(c)(8).

However, my position should not be construed as preventing the Certifying Officer from inquiring into whether the job is a bona fide job opportunity for U.S. workers. The key phrase is “bona fide...opportunity.” Clearly, in this case, the Employer is offering full-time employment, as he is offering 40 plus hours per week. However, just because it is full-time does not mean that there is a bona fide opportunity for a U.S. worker to be hired. That is why the Certifying Officer must inquire into how the job was advertised, how U.S. workers were recruited, whether a prevailing wage is offered, whether there are unduly restrictive job requirements, or whether the working hours and conditions are normal, etc. All of these factors are provided for in the regulations and are the issues to be considered in determining whether the job opportunity is bona fide.

In my view, this case is easily distinguishable from the alien investor in *Modular Container Systems, supra*. There, since the alien was a principal in the company, he was the company. Without him, the company would not exist. Therefore, there was no bona fide opportunity for a U.S. worker to be hired. In the instant case, if the employer truly recruits U.S. workers and otherwise complies with the regulations, but is unsuccessful in locating a U.S. worker to take the job, who cares whether the cook will be occupied for 8 hours a day. The point is that the job would have been a bona fide opportunity, *i.e.*, clearly open to any qualified U.S. worker.

Further, I also agree with the majority that a finding of a violation of § 656.20(c)(8) is especially problematic insofar as it is a highly generalized citation of error. Indeed, the “totality of circumstances” approach promotes the very generalization that has led us and the Certifying Officers to these troubling cases. The majority takes this totality of circumstances analysis far beyond the holding in *Modular Container*, and to such an extreme that it becomes the sole grounds for denial of any labor certification application, consuming everything in its path, including all of Part 656.

Virtually every provision of Part 656 can be construed as demonstrating that a job is not

clearly open to any qualified U.S. worker in violation of § 656.20(c)(8). A job which is offered at less than prevailing wages is not clearly open to any qualified U.S. worker in violation of § 656.20(c)(8). A job which is offered with unduly restrictive requirements is not clearly open to any qualified U.S. worker in violation of § 656.20(c)(8). A job which is offered with unusual working hours is not clearly open to any qualified U.S. worker in violation of § 656.20(c)(8). A job in which an employer does not recruit U.S. workers is not clearly open to any qualified U.S. worker in violation of § 656.20(c)(8). A job in which qualified U.S. workers are unlawfully rejected is not clearly open to any qualified U.S. worker in violation of § 656.20(c)(8). This approach could be applied until there is no need for any regulation except § 656.20(c)(8).

The regulations provide in § 656.25 that if a labor certification is not granted, the Certifying Officer shall issue a Notice of Findings to the employer and the alien which states the **specific** bases on which the decision was made. A citation to § 656.20(c)(8) should only be made where a more specific code section does not apply. In my view, the approach of the majority, while not technically incorrect, promotes a citation of § 656.20(c)(8) under the all encompassing umbrella of “totality of the circumstances,” to the exclusion of the more specific regulations. In essence the majority would create its own “unpublished” set of regulations by case law for deciding cases under § 656.20(c)(8), rather than following the balance of Part 656. Indeed, all of the relevant factors cited by the majority in the “totality of circumstances test” are rooted in specific sections of the regulations without considering § 656.20(c)(8). Such an approach is not fair to the parties, will promote unclear and confusing Notices of Findings, and in my judgement will result in our having to revisit often the issue of whether the CO’s NOF is adequate to provide due process.

Therefore, I would instruct the CO that whether the Employer has sufficient cooking duties to keep the cook busy every working hour is not relevant; I would remand for a new NOF which complies with § 656.25 by identifying the specific bases (and code sections) for its findings; and I would instruct the CO that a citation to § 656.20(c)(8), where a more specific section is applicable, will be considered vague and inadequate.

Donald B. Jarvis, Administrative Law Judge, concurring:

I concur in the result. The regulations provide that applications for alien labor certification under Part 656 of the Code of Federal Regulations are for “permanent employment.” 20 C.F.R. 656.1 (a). Employment is thereafter defined as “permanent full time work by an employee for an employer other than oneself.” 20 C.F.R. 656.3. Section 656.20(c) sets forth the information an employer must provide in the Application for Alien Employment Certification (Form ETA 750). In the light of the previously cited regulations it is implicit that the term “job offer” refers to permanent, full time employment.

The majority opinion relegates the question of full time employment to one element in a totality of circumstances test and forecloses its use as an independent consideration by the CO.

This is incorrect and inconsistent with the regulations.

The totality of circumstances test relates to the question of whether there is a bona fide job opportunity and thus whether the job opportunity is clearly open to qualified U.S. workers. This issue is encompassed by Section 656.20(c)(8). It is separate and distinct from the issue of full time employment which is covered by Section 656.3. I agree with the discussion of Judge Huddleston in his concurring opinion on this issue. I have no quarrel with the use of full time employment as one factor in a totality of circumstances test on the question of whether there is a bona fide job opportunity. My disagreement with the majority opinion is that the adoption of the totality of circumstances test cannot foreclose the CO from challenging an application solely on the basis that it does not call for full time employment as required by Section 656.3.

The regulations call for full time employment, not full time pay for less than full time work. If we were not dealing with alien labor certification an employer could make any arrangement he or she chooses consistent with the wage and hour laws. Alien labor certification is an exception to the general operation of the Immigration and Nationality Act by which Congress favored treatment for a limited class of alien workers whose skills were needed in the U.S. labor market. “The purpose of labor certification under 8 U.S.C. § 1182(a)(14) is to exclude aliens competing for jobs American workers could fill and ‘protect the American labor market from an influx of both skilled and unskilled foreign labor.’ ... The grant of an exemption under 8 C.F.R. § 212.8(a) should not impair or sacrifice this objective of protecting the American job market from alien competition.” *Wang v. Immigration & Naturalization Service*, 602 F. 2d 211, 213–214 (9th Cir. 1979) (footnote omitted) (citations omitted); *see also Pancho Villa Restaurant, Inc. v. U.S. Dept. of Labor*, 796 F.2d 596, 597 (2nd Cir. 1986); *Yin Tsang Cheung v. District Director*, 641 F.2d 666, 669 (9th Cir. 1981). Under the regulations, the CO has the right and duty to inquire whether the job offered constitutes full time employment as a separate issue. I disagree with the majority opinion and the portion of Judge Huddleston’s concurring opinion which hold otherwise.

Section 656.21(b)(2)(i)(A) requires that the job opportunity’s requirements, unless adequately documented as arising from business necessity shall be those normally required for the job in the United States. Normally, employers do not pay full time wages for less than full time work. Eccentric employers do not set the norm. Whatever suspicions may be aroused where the job does not call for full time work (e.g. that the employee may perform other duties not specified in the application) the CO should be able to avoid this collateral issue by denying certification on the basis that the employer has failed in its burden of proof to establish full time employment under Section 656.3.

In holding that full time employment is only an element in a totality of circumstances test the majority should be prepared to revisit and overrule numerous Board cases dealing with Home Tutors, Child Monitors, Landscape Gardeners and others.

In *Gary and Nancy Gee*, 1997-INA-108 (March 10, 1998), the Board denied alien labor

certification, finding that the Employer failed to establish that the position of “Home Tutor” constituted permanent full time employment. The Board agreed with the CO’s finding that the Employer inflated the hours for the position and stated, “we cannot accept the proposition that a tutor needs 20 hours to prepare lessons and review the work of only two pupils.” The Employer had asserted that the tutor would work from noon to 9:00 p.m. spending the first three to four hours per day preparing and reviewing lesson plans and the later four to five hours teaching the children. *See also Ms. Ruth Hai*, 1993-INA-111 (June 9, 1994); *Dr. Marta De Pierris*, 1993-INA-525 (Sept. 15, 1994); *Miaofu Cao*, 1994-INA-53 (Nov. 29, 1994), *rev’d on other grounds* (Mar. 14, 1996) (*en banc*).

In *Joan Bensinger*, 1989-INA-52 (Oct. 30, 1989), the Employer filed for Alien Labor Certification for the position of “Child Monitor, Live-Out”. The Employer asserted that the Alien would work a basic 40 hour work week. Upon review of the record, the Board was “not persuaded that the duties to be performed outside the presence of the child described by the Employer would occupy any significant part of the seven hours between 8:00 a.m. and 3:00 p.m., or could not be accomplished during the period from 3:00 p.m. to 5:00 p.m. daily.” The Board held that the proposed employment does not constitute full time employment.

In *Vito Volpe Landscaping*, 1991-INA-300 (June 3, 1993) (*en banc*), the board definitively described the nature and content of full time employment for landscape workers. The issue to be determined in these cases was whether the Employer’s proof established that the worker in the landscaping position historically works full time through out the year. The Board held that if these employers believed that they could qualify for permanent labor certification on the basis that they will employ the alien during the off season, they must answer the questions, “Is there really work requiring full time employment in the off season and if so, would this be an unduly restrictive combination of duties; or are U.S. workers put on paid vacation for this period (thereby taking the job out of the seasonal definition of 8 CFR section 214.2(h)(6)(ii)(B)(2))?” The Board held that the fact that these employers would again need employees in successive years after the off-season did not make the employer’s needs permanent.

In *R.J. Landscape Design, Inc.*, 1996-INA-233 (Feb. 11, 1998), the Employer asserted that the gardening duties of the Landscape Gardener are performed for 10 months per year and the remaining months are spent making repairs to concrete and asphalt walks and driveways. The Board denied certification holding that: “Where the employer cannot provide any documentation of a full time position and where the type of work is typically seasonal work, the employer has not clearly established that a full time job opportunity exists and certification is properly denied.” *See also Landscape Service Corp.*, 1997-INA-85 (Jan. 26, 1998) (The CO found the employer’s argument and evidence unpersuasive and concluded based on the payroll information, it was impossible to determine whether the employees worked during the winter months.). Similarly, certification was denied in *Herman Moro Landscaping*, 1996-INA-332 (Dec. 4, 1997) despite a letter from a customer of the Employer verifying that its landscape gardeners did work for her in the winter months. The Board explained that the letter was “helpful, but its value was limited in that it failed to demonstrate that the off season work that it described was characteristic of the

ongoing general pattern of the Employer's business." See also *Susan Cardinale*, 1997-INA-48 (June 12, 1998).

A logical inquiry as to whether a job constitutes full time employment encompasses the hours to be worked and the duties to be performed. We have not sought to foreclose the CO from making such inquiries in any occupation other than domestic cook. Because domestic cook cases have become vexing to the Board we cannot deprive the CO of a legitimate area of inquiry under the regulations.

Full time employment generally contemplates a work week of approximately 40 hours. Of course an employer may show that the usual work week in a given occupation is more or less than 40 hours. The Board should allow the CO to apply his or her expertise and common sense in this area. See *United States v. Marchand*, 654 F. 2d 983, 1000 (2nd Cir. 1977); *Achilles v. New England Tree Expert Co.*, 369 F. 2d 72, 73 (2nd Cir. 1966). There is nothing in this record or in any other case which has been before the Board which indicates that full time domestic cooks do not generally work approximately 40 hours a week.

A CO may require an employer to furnish work schedules, prospective menus and other details about the job including the number of persons in the household, etc. *Marguerite Gorman*, 1995-INA-672 (August 25, 1997); *Dr. Daryao S. Khatri*, 1994-INA-016 (Mar. 31, 1995). In many instances these inquiries have ferreted out the fact that the employer has not offered full time employment. *Arturo Rosales*, 1997-INA-129 (July 1, 1998); *Marguerite Gorman, supra*; *Dr. Daryao S. Khatri, supra*; *Mr. & Mrs. Clifford Cummings*, 1994-INA-008 (Dec. 21, 1994); *Marianne Tamulevich*, 1994-INA-054 (Dec. 5, 1994). In other instances the CO and employer have engaged in disputes about the reasonableness of the times allotted to various tasks. Where the CO has acted arbitrarily, the Board has reversed or remanded. *Anita Kirschner*, 1995-INA-682 (January 30, 1998); *Alice Rog*, 1995-INA-679 (Sept. 30, 1997); *Bartosz Strojek*, 1995-INA-633 (May 30, 1997). While this procedure does not provide a formula for adjudicating domestic cook cases, I am of the opinion that it is the correct procedure under the regulations.

I concur in the result in this case because the Final Determination ("FD") is inadequate. The Notice of Findings ("NOF") properly required the employer to submit specific data to establish full time employment under Section 656.3. (AF 154-55). Employer filed a 13 page rebuttal to the NOF. (AF 128-141). In the FD, the CO in denying certification stated "it has not been shown that the job duties constitute full time employment in the context of their household." (AF 119). The CO also stated that: "The rebuttal fails to demonstrate that the job duties of a domestic cook, as described on the application for labor certification, constitute a full time job." (Id.). The only rationale for these conclusions is that the "rebuttal does not provide information sufficient to explain convincingly what the cook does during all the work hours" (Id.).

Employer's 13 page rebuttal appears to have complied with the requests for information requested in the NOF. If the CO wanted more specific information she should have issued a supplemental NOF. I would remand this case to the CO for the issuance of an additional NOF

and proceedings consistent with this decision.

James Lawson, Administrative Law Judge, concurring:

I concur except that I disagree with the majority's statement expressing doubts as to what was considered by the CO in the Final Determination. Under the topic "FINAL DETERMINATION. CO MUST CLEARLY STATE RATIONALE AND BASIS FOR CONCLUSION", the majority opinion states, among other things:

...For instance, the CO raised the issue of sufficiency of funds in the NOF, but did not mention it in the Final Determination....Since the CO raised the sufficiency of the funds issue separately under section 656.20(c)(1) and (c)(4), and made no reference to it in regard to the section 656.20(c)(8) analysis, we do not know on the appeal whether the CO considered Employer's financial position at all in assessing the *bona fide* nature of the position, or whether this was the basis or part of the reasoning for not believing Mr. Uy.

I think it should be fair to assume, on review, that NOF findings, not specifically discussed in the FD, have been considered by the CO and satisfied by the employer. The antithesis would muddy the focus of review, encourage fishing expeditions to find non-articulated bases to sustain denials of certification, impair administrative-judicial efficiency, raise questions of due process and cast uncertainty as to the scope of review. It seems clear that NOF findings not discussed in the FD have been satisfied.¹ Moreover the quoted discussion is unnecessary herein since the Board is pronouncing an entirely new standard, only a part of which involves sufficiency of funds, so that the CO and the employer should both be given the opportunity to address the new standard in its entirety.² The scope of review should not thus unnecessarily be pronounced without input and full consideration of that issue. I believe that the subject of the scope of administrative-judicial review is in itself appropriate for consideration and discussion at some other time in a separate decision where it is in issue. Here, the issue is gratuitously raised in circumstances which allow no input from the BALCA bar. I don't think this case should be the vehicle for such a pronouncement.

¹ See *BALCA Benchbook* at Chapter 26 III D and cases cited there: *Drs. Preisig & Alpern*, 1990-INA-35 (Oct. 17, 1990); *Loew's Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*); *Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (*en banc*); *Hough International*, 1991-INA-24 (Mar. 18, 1991) (*per curiam*); *International Student Exchange of Iowa*, 1989-INA-261 (Apr. 21, 1992) (*en banc*); *Mr. & Mrs. Marc Cohen*, 1995-INA-150 (Dec. 5, 1996); *Gail Bratman*, 1994-INA-568 (Aug. 30, 1996); and *Hunter's Inn*, 1995-INA-278 (Feb. 19, 1997).

² See *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*); *Delitizer Corp. of Newton*, 1988-INA-482 (May 9, 1990) (*en banc*); and *Tel-Ko Electronics, Inc.*, 1988-INA-416 (July 30, 1990) (reconsideration *en banc*).